

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs February 14, 2006

**TERRY T. LEWIS v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Davidson County**  
**No. 96-D-2173     Seth Norman, Judge**

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**No. M2005-01673-CCA-R3-PC - Filed April 20, 2006**

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The Petitioner, Terry T. Lewis, appeals the Davidson County Criminal Court's denial of his petition for post-conviction relief. The Petitioner was convicted of first degree murder and attempted robbery. On appeal, the Petitioner argues that he received ineffective assistance of counsel. After a review of the record, we affirm the denial of post-conviction relief.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

DAVID H. WELLES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JOHN EVERETT WILLIAMS, JJ., joined.

Jefre Scott Goldtrap, Nashville, Tennessee, for the appellant, Terry T. Lewis.

Paul G. Summers, Attorney General and Reporter; C. Daniel Lins, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Dan Hamm, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**Factual Background**

In 1998, the Petitioner was convicted by a Davidson County jury of first degree murder and attempted robbery. As a result of these convictions, the Petitioner was sentenced to a term of life imprisonment and two years in the Department of Correction, to be served concurrently. On direct appeal, a panel of this Court affirmed the convictions but remanded the case for correction of the judgment form on the attempted robbery conviction. State v. Lewis, 36 S.W.3d 88, 101 (Tenn. Crim. App. 2000), perm. to appeal denied, (Tenn. Oct. 30, 2000). As summarized on direct appeal, the facts underlying these convictions are as follows:

[O]n the afternoon of July 10, 1996, the [Petitioner] and Teresse Patterson were riding around Nashville in an older model blue Cadillac with bullet holes on the driver's side. Patterson was driving, and [the Petitioner] was in the front passenger seat. The two were drinking liquor. There was a Glock semi-automatic weapon in the car which belonged to the individual from whom Patterson had borrowed the Cadillac. [The Petitioner] began talking about "getting paid," which is slang for committing a robbery or selling drugs; however, Patterson was recently paroled and not anxious to engage in any criminal activity.

[The Petitioner] wanted to go through the Haynes Park area, and Patterson drove to that location. While they were in this area, they encountered the victim, Eugene Blakemore, who was walking on Haynes Park Drive. The victim was wearing a large, gold, herringbone necklace, and [the Petitioner] said he wanted to rob the victim. Patterson implored [the Petitioner] not to shoot the victim, and [the Petitioner] said, "I'm not going to shoot him." Patterson turned around in a driveway so that the victim would be on [the Petitioner's] side of the Cadillac. Patterson drove slowly to the victim, and the [Petitioner] said, "You know what this is, give me what you got. If you run I'm going to shoot you." [The Petitioner] had the Glock pistol in his hand, and when the victim saw it, he ran. [The Petitioner] then fired a single shot at the victim, fatally striking him in the back of the head. The victim fell, and Patterson and [the Petitioner] left the scene in the Cadillac.

Winston Davidson, whose wife was a cousin of the victim, witnessed the encounter between Patterson, [the Petitioner] and the victim. Davidson was standing inside his home on Haynes Park Drive looking out the front door. The crime occurred in front of Mr. Davidson's house, and when the victim was shot, he fell in Mr. Davidson's yard.

Through investigative work, the police recovered the Cadillac the following day. The vehicle was processed for fingerprints, and prints matching those of the [Petitioner] were found on the rain guard above the passenger side window.

A 45-caliber shell casing was recovered from the scene of the crime. During the subsequent investigation, police officers went to [the Petitioner's] apartment approximately five days after the crime. As the officers were coming down the stairs outside [the Petitioner's] apartment, they found another 45-caliber shell casing. [The Petitioner] had arrived at his apartment after the officers, and one of the officers testified that he believed [the Petitioner] had approached the apartment from the direction in which the shell casing was found. The two shell casings were compared by a forensic scientist employed by the Tennessee Bureau of Investigation, who opined that both shells were of the same manufacture and caliber, and both had been fired from the same weapon. The forensic scientist further opined that the weapon was most likely of Glock manufacture.

Both Patterson and [the Petitioner] were interviewed by the authorities, and both initially denied any involvement in the crime. The [Petitioner] acknowledged he had at some point been inside the Cadillac with Patterson, but he claimed this was not on the day of the crime. Eventually, Patterson admitted his culpability, and he gave the authorities information about [the Petitioner's] involvement. Patterson testified for the state at trial, and he admitted that he hoped to gain a favorable sentencing recommendation from the state for his testimony.

[The Petitioner] finally admitted that he shot the victim. However, he told the authorities that he had approached the victim to inquire whether he was the same individual with whom he had been in a recent altercation in a nightclub. [The Petitioner] said that he thought the victim was reaching for a weapon, and [the Petitioner] himself was holding the Glock that was in the car. [The Petitioner] claimed that as he was taking out the Glock or putting it up, it accidentally discharged, striking the victim. [The Petitioner] claimed at one point that the weapon discharged when it struck the car window, but he also said he had his arm straight out.

Id. at 92-93.

On October 29, 2001, the Petitioner filed a pro se petition for post-conviction relief. Counsel was appointed, and an amended petition was filed on July 30, 2004, alleging that he was denied the effective assistance of counsel. A hearing was held on April 25, 2005,<sup>1</sup> at which only the Petitioner and trial counsel testified. After hearing the evidence presented, the post-conviction court denied relief by written order on May 26, 2005. This timely appeal followed.

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<sup>1</sup> We note that three-and-a-half years elapsed between the filing of the petition and the evidentiary hearing. In regards to such delay, the record reflects that, on December 4, 2001, Mr. Jefre S. Goldtrap was appointed to represent the Petitioner, and the matter was set for February 20, 2002. Mr. Goldtrap moved to withdraw on February 18, 2002, because he had accepted employment in Alaska. On March 4, 2003, the post-conviction court granted Mr. Goldtrap's motion to withdraw and appointed Mr. Bruce Poag to represent the Petitioner. Mr. Poag filed an amended petition alleging ineffective assistance of counsel in July of 2004; however, he filed a motion to withdraw on September 29, 2004. Mr. Poag moved to withdraw because the Petitioner insisted that he allege the attempted robbery count of the indictment was insufficient; an issue which Mr. Poag deemed frivolous. On January 13, 2005, Mr. Poag was relieved from representation, and Mr. Goldtrap, who had returned to Tennessee, was again appointed to represent the Petitioner.

The issue of an insufficient indictment on the attempted robbery count was not presented as an issue either in the post-conviction court or on appeal. Moreover, this ground was raised in the Petitioner's direct appeal of his convictions and found to be without merit. The post-conviction procedure may not be used to re-litigate issues that have been "previously determined." Tenn. Code Ann. § 40-30-106(f); see also *Miller v. State*, 54 S.W.3d 743, 747-48 (Tenn. 2001) (holding that issue raised and resolved in petitioner's direct appeal "cannot be revisited in this post-conviction proceeding").

## ANALYSIS

On appeal, the Petitioner raises the single issue of whether he received the ineffective assistance of counsel. To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The trial judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

The Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the petitioner's lawyer, and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The petitioner bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The petitioner's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks, 983 S.W.2d at 246.

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo

standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. “However, a trial court’s conclusions of law--such as whether counsel’s performance was deficient or whether that deficiency was prejudicial--are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court’s conclusions.” Id.

In this appeal, the Petitioner contends that the representation he received from his trial counsel was ineffective. The Petitioner’s entire argument is recited as follows:

[The Petitioner] would respectfully argue that his trial counsel was ineffective. [The Petitioner] would assert that his trial counsel failed to adequately and thoroughly discuss with Petitioner specifics about his case, trial counsel was unprepared for trial and counsel failed to meet with the Petitioner with sufficient frequency and quality to allow for the Petitioner to assist in his own defense. [The Petitioner] would respectfully assert that trial counsel was ineffective and that [the Petitioner] was prejudiced by such ineffective assistance in that he was required to go to trial with counsel that was ill prepared for a serious trial which had the possibility of producing a sentence which would consume the remaining life of the [Petitioner].

The Petitioner’s argument fails to articulate how counsel was not adequately prepared for trial, fails to state what facts about the case were not communicated to him prior to trial, and fails to specify how he was prohibited from assisting in his own defense. Moreover, the Petitioner does not provide this Court with any explanation as to how he was prejudiced by these deficiencies. Accordingly, Petitioner has waived appellate review. See Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b). Nonetheless, we elect to review the issue due to the severity of a murder conviction and a life sentence.

#### I. Preparation

The Petitioner contends that he received ineffective representation because his trial counsel was not adequately prepared for trial, failed to meet with him a sufficient number of times, and failed to discuss the facts of the case with him.

In its order denying relief, the post-conviction court found:

[Trial counsel] testified at the evidentiary hearing that he met with the petitioner several times in the course of his representation of the petitioner in this matter. He also stated that he had discussed with the petitioner his right not to testify at trial and how strong of a case the state had against him. The petitioner also testified that he and counsel met quite a bit prior to trial and that [trial counsel] discussed in detail what existed against him.

The evidence does not preponderate against the findings of the post-conviction court.

At the post-conviction hearing, trial counsel testified to his thorough preparation for trial and numerous meetings with the Petitioner. Moreover, the Petitioner discredited his assertions of ineffectiveness. He testified that trial counsel “came and visit[ed] me pretty much a lot” and they discussed “how the case was developing” and the evidence the State had against him. Moreover, the Petitioner stated that trial counsel conferred with him regarding the motion to suppress, the ballistic evidence in the case, various plea offers, and whether the Petitioner should testify. The Petitioner admitted that, to his knowledge, he was aware of all evidence prior to trial and no new evidence had been discovered.

The Petitioner simply states vague and ambiguous second-guesses and regrets. The testimony at the post-conviction hearing reveals that trial counsel and the Petitioner met on multiple occasions to prepare for trial and the lines of communication were open and used by both the Petitioner and his trial counsel, allowing the Petitioner to make well-informed decisions and assist in his defense. The State’s case clearly placed the Petitioner at the scene of the murder and included the Petitioner’s own statement and testimony from an eyewitness and the co-defendant. The proof presented by the Petitioner falls far short of clear and convincing evidence, and the errors complained of would not have affected the outcome. Accordingly, the Petitioner failed to prove that his counsel’s representation fell outside the wide range of reasonable professional assistance.

## II. Defense Theory

By the Petitioner’s cite in his brief to State v. Zimmerman, 823 S.W.2d 220 (Tenn. Crim. App. 1991), and his argument presented in the post-conviction court, the Petitioner infers that trial counsel was ineffective because he failed to present crucial evidence in support of the previously announced defense theory.

In Zimmerman, the defendant was charged with second degree murder. During opening statement, counsel informed the jury, in accordance with trial strategy, that the defendant and a psychologist would testify regarding the defense of “battered wife syndrome.” Zimmerman, 823 S.W.2d at 221. However, at the conclusion of the State’s proof, counsel recommended to the defendant that she not testify. Id. at 222. Moreover, although lay and expert witnesses were available to testify that the defendant “was a physically abused and battered wife under unusual stress[,]” none of the witnesses were called, as the defense offered no proof. Id. at 224. This court concluded that counsel was ineffective, stating that “nothing changed during the course of the trial. . . . In other words, there appears to have been no basis for the sudden change in strategy.” Id. at 226.

In the instant case, trial counsel’s strategy was to attack the case through cross-examination. The theory of defense from the inception of the case was that the Petitioner accidentally shot the victim. At no time during the trial did trial counsel change or abandon this theory. In fact, trial counsel vigorously pursued this defense. On direct appeal, this Court noted that:

through cross-examination of the state's witnesses, the defense pursued a theory of accidental shooting during the course of an encounter between the defendant and someone with whom he had been in a previous confrontation. The defense strongly challenged the state's evidence that the killing had been intentional and that the defendant was in the process of perpetrating a robbery when he killed the victim.

Lewis, 36 S.W.3d at 93 (emphasis added). Accordingly, we conclude that the Petitioner has failed to establish that trial counsel was deficient in this regard. This issue is without merit.

### III. Suppression of Statement

We also glean from the record and the Petitioner's brief his allegation that trial counsel was ineffective because trial counsel failed to seek suppression of the Petitioner's statement on the ground that the videotape was "spliced[.]" According to the Petitioner, a segment at the beginning of the tape was erased wherein he informed the interviewing officers that he was making this statement because it was "what they want[ed] to hear" and they "told me it would be better for me[.]"

First, we note that trial counsel did move to suppress the statement, arguing that "the arrest was illegal because the arrest warrant was issued in the face of an insufficient showing of probable cause[.]" Lewis, 36 S.W.3d 97. Moreover, trial counsel raised this issue on direct appeal. See id. Trial counsel did not pursue suppression on the ground now argued by the Petitioner.

At the post-conviction hearing, trial counsel testified that he did not recall the Petitioner ever mentioning to him that there was an omission on the tape. Moreover, trial counsel stated, "I didn't see anything when I looked at the video tape that indicated to me that it had been altered in any way."

After hearing the testimony of the Petitioner and trial counsel at the evidentiary hearing, the post-conviction court found no merit to this argument. The post-conviction court obviously credited the testimony of trial counsel that the facts and circumstances in the Petitioner's case simply did not raise a suppression issue on this ground. Because we do not revisit the issue of credibility on appeal, we defer to the post-conviction court's ruling in that regard. Momon, 18 S.W.3d at 156. In sum, the Appellant has failed to show ineffective assistance of counsel.

### CONCLUSION

Based upon the foregoing, we conclude that the Petitioner received the effective assistance of counsel. The post-conviction court properly dismissed the petition for post-conviction relief. Accordingly, the judgment of the Davidson County Criminal Court is affirmed.

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DAVID H. WELLES, JUDGE